

## Delhi High Court upholds CCI's investigation against WhatsApp and Facebook

On 25 August 2022, the Division Bench of the Delhi High Court (“DHC”) dismissed the appeals filed by WhatsApp Inc. (“WhatsApp”) and Facebook Inc. (“Facebook”) challenging the jurisdiction of the Competition Commission of India (“CCI”) to initiate an investigation against them for alleged abuse of dominance in relation to WhatsApp’s privacy policy.

### Background

On March 24, 2021, the CCI initiated a *suo-moto* investigation against WhatsApp and Facebook for abusing their dominant position by imposing unfair terms in relation to the updated WhatsApp’s privacy policy of 2021 (“2021 Policy”). The CCI noted that the 2021 Policy makes it mandatory for users to accept the terms and conditions to retain their WhatsApp account and mandates sharing of personalised user information with its parent company i.e., Facebook. Further, it noted that the wordings of the 2021 Policy were opaque, vague, open-ended, and lacked complete disclosures, thereby hiding the actual data cost that a user incurs for availing WhatsApp services (“CCI Order”).

### Jurisdictional Challenge

WhatsApp and Facebook challenged the CCI Order before the Single Judge of the DHC<sup>1</sup>, *inter alia*, contending that the CCI does not have jurisdiction to initiate an investigation since a judicial challenge against the 2021 Policy and terms of service is pending adjudication before the Supreme Court of India (“SC”) and DHC on the ground that it violates the right to privacy under Article 21 of the Constitution of India. On 22 April 2021, while dismissing the writ petition, the Single Judge held that the pendency of the issues before the SC and before itself would not bar the CCI from exercising its jurisdiction (“Single Judge Order”).

### Decision of the Division Bench

Aggrieved, WhatsApp and Facebook filed an appeal against the Single Judge Order before the Division Bench of the DHC (“Division Bench”). They primarily relied on the judgment of the SC in the *CCI v. Bharti Airtel & Ors*<sup>2</sup> (“Airtel Judgement”) and argued that if the same issue is decided by different authorities (i.e., the SC/ DHC and the CCI), then it might lead to conflicting opinions being rendered. The Division Bench while dismissing the appeals, noted that reliance on the Airtel

<sup>1</sup> W.P. (C) 4378/2021 and W.P. (C) 4407/2021

<sup>2</sup> Civil Appeal No(s). 11843 OF 2018 (arising out of SLP (C) No. 35574 OF 2017)

Judgement is erroneous since it dealt with the conflict between the market and a sectoral regulator (and not a court). It further noted that:

- (a) While the SC and DHC are looking into whether the 2021 Policy is violative of the right to privacy under Article 21 of the Constitution of India, the investigation by the CCI is confined to the allegations relating to the abuse of dominant position by WhatsApp under the provisions of the Competition Act. Neither the SC nor the DHC are analysing the 2021 Policy from the prism of competition law.
- (b) Parallel inquiries by two different authorities in their respective spheres of adjudication is not uncommon. In the absence of any irreconcilable repugnancy between the jurisdiction of both authorities i.e., the CCI and the SC/ DHC, the CCI can proceed with the investigation.

## JSA Comment

The decision provides welcome clarification on the interpretation of the Airtel Judgement and that the said judgment cannot be extrapolated to suggest that the CCI's jurisdiction will always be deferred if another statutory authority or court were involved contemporaneously. The decision could have a far-reaching effect on similar jurisdictional challenges pending before other courts.

## Competition Practice

Since the inception of the Indian competition regime, JSA has been a one-stop shop for all types of competition and anti-trust-related matters. As such, the team's in-depth understanding of the competition law, coupled with its commercially focused litigation skills has been the cornerstone on which it deals with matters relating to cartelisation (including leniency), abuse of dominance, vertical agreements, and dawn raid before the Competition Commission of India and appellate courts. The team regularly advises clients on general competition law issues arising from day-to-day business strategies and conducts competition compliance training for clients. Given the team's continued involvement with the regulator, coupled with its balanced and practical approach to competition law, it has been instrumental in shaping the competition law jurisprudence in India.

Over the years, the team has developed a reputation of not only being well regarded by its peers but also for having developed a good working relationship with the regulatory authorities. As such our lawyers have been involved in drafting statutory regulations and have represented the Indian competition law fraternity at various competition law seminars, workshops, and advocacy & public awareness programs across the world. The team's expertise (including team members) has been widely recognised by various leading international rankings and publications including Chambers and Partners, Who's Who Legal, Global Competition Review, Benchmark Litigation, Asialaw, and the Legal 500.

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15 Practices and  
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7 Practices and  
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